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IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES NAVIGATION COMPANY, INC., Petitioner, against THE CUNARD STEAMSHIP COMPANY, LTD., OCEANIC STEAM NAVIGATION COMPANY, LTD., FURNESS WITHY & COMPANY, LTD., ATLANTIC TRANSPORT COMPANY, LTD., ANCHOR LINE (HENDERSON BROS.), LTD., BRISTOL CITY LINE OF STEAMERS, LTD., CANADIAN PACIFIC STEAMSHIPS, LTD., DONALDSON BROS., LTD., ELLERMAN'S WILSON LINE, LTD., G. HEYN & SONS, LTD., F. LEYLAND & COMPANY, LTD., MANCHESTER LINERS, LTD., CAIRN LINE OF STEAMSHIPS, LTD., FRANKLIN A. RYAN and JAMES SINCLAIR, Respondents.	October Term 1931 No. 296

PETITIONER'S REPLY BRIEF

The petitioner does not, as assumed at page 19 of the respondents' brief, contend that agreements between shippers and carriers are required to be filed with the Board, and the respondents' arguments founded upon their assumption of such a contention are beside the point.

The petitioner relies and has relied on the contention that the respondents have entered into agreements and

understandings among themselves to put into effect the monopolistic, unfair and discriminatory practices complained of (R. 27). These practices include the making of joint exclusive contracts with shippers (R. 7-11) and other methods aimed at the destruction of the petitioner's competition (R. 11-13).

By the respondents' failure to file and obtain the Board's approval of the agreements among themselves, those agreements and the practices committed pursuant thereto (such as the use of joint exclusive patronage contracts) are not exempted from the condemnation of the anti-trust laws.

The respondents' brief misinterprets the petitioner's position in regard to the Shipping Act, and seeks to create the impression that the petitioner disregards the provisions of the Act but that the respondents seek to observe and follow them. The shoe is on the other foot. The agreements and understandings, pursuant to which the illegal acts are alleged in the complaint to have been committed, are agreements and understandings among the respondents, which have not been filed with or approved by the Shipping Board (R. 27). Therefore, the respondents have no ground for their contention that they are exempted from the application of the anti-trust acts, since the only ground for such exemption is filing with and approval by the Board. *U. S. Code,* Ti. 46, §814, set forth in *Appendix A,* pp. 60-61 of petitioner's brief. The petitioner is not proceeding or seeking relief under the Shipping Act. It seeks relief solely under the anti-trust laws, as is clearly stated in the complaint. The Shipping Act has nothing to do with the case, because the respondents have not, by compliance with its requirements for filing with the Shipping Board the agreements and understandings among themselves,

taken the necessary steps to make their acts lawful or brought them within the scope of the Shipping Act.

The respondents depend chiefly on two official acts of the Shipping Board pursuant to the Shipping Act, of which they ask this Court, as they have unsuccessfully asked both courts below, to take judicial notice, namely, approval by the Shipping Board of an agreement known as "Conference Agreement No. 16" and a proceeding known as "Shipping Board Ex Parte 5 Contract Rate Investigation."

I

NEITHER OF THESE ACTS IS THE SUBJECT OF JUDICIAL NOTICE.

The authorities cited by the respondents in which judicial notice has been taken of governmental acts concern acts of the Executive Departments of the government. These decisions are based on the statutes relating to these departments, and whether or not judicial notice will be taken of such acts depends on whether or not the statute gives such acts the force of law.

The reports of the Shipping Board do not have such status. Section 24 of the Shipping Act provides as follows:

> *"Records of board; copies; publication of reports; evidence.* The board shall enter of record a written report of every investigation made under this chapter in which a hearing has been held, stating its conclusions, decision, and order, and, if reparation is awarded, the findings of fact on which the award is made, and shall furnish a copy of such report to all parties to the investigation.

> "The board may publish such reports in the form best adapted for public information and use, and such authorized publications shall, without further proof or authentication, be competent evidence of such reports in all courts of the United States and of the States, Territories, Districts, and possessions thereof." *U. S. Code*, Ti. 46, §823.

The analogous provision in the Interstate Commerce Act, in almost identical language, has been held to make decisions of the Interstate Commerce Commission, so published, admissible without other proof of genuineness, "but it does not require that they be judicially noticed or relieve litigants from offering them in evidence as they would any other competent evidence intended to be relied upon." *Robinson* v. *Balt. & Ohio R. R.*, 1912, 222 U. S. 506, 512.

It is submitted, therefore, that both courts below rightly refused to take judicial notice of either of the acts of the Shipping Board on which the respondents rely.

II

"Conference Agreement No. 16" is not material to this case.

The respondents contend, as they contended in both courts below, that the agreements and understandings among the combined lines, of which the petitioner complains, have been made lawful by virtue of approval by the Shipping Board on March 19, 1929, of an agreement known as "Conference Agreement No. 16." under which the respondents and other carriers formed the so-called North Atlantic United Kingdom Freight Con-

ference. The respondents' argument is that the Board's approval of this "basic" agreement exempted the parties to it from the condemnation of the anti-trust laws in respect of all agreements and acts which the respondents are pleased to consider as being entered into or performed pursuant to that agreement.

These contentions were not sustained by either of the courts below and are unsound for the following reasons:

1. The record contains no mention of the so-called "Conference Agreement," and the attempt by the respondents to inject into the record the agreement and argument founded upon it is improper. The amended bill of complaint specifically charges that the agreements and understandings among the respondents constituting the combination, conspiracy and attempt to monopolize, whereby the combined lines have entered into joint exclusive patronage contracts with shippers and performed the other practices complained of, have not been filed with or approved by the Shipping Board (R. 27). The respondents' motion to dismiss, like a demurrer, admits these allegations of fact, and the issues before the court, raised by the motion to dismiss, relate only to the sufficiency of the facts pleaded. Hence, on this record the respondents may not contend that there has been approval.

2. If the respondents intend to base a defense upon "Conference Agreement No. 16," they cannot raise it on this record, but, as held by the District Court (R. 43) they must plead it by way of answer. *McKelvey* v. *United States*, 1922, 260 U. S. 353, 357; *Javierre* v. *Central Altagracia*, 1910, 217 U. S. 502, 508. The re-

spondents' argument is an attempt to try this case, on a motion to dismiss, on a statement of facts other than those alleged in the complaint.

3. "Conference Agreement No. 16," quoted in respondents' brief, does not authorize "complete co-operation" as the respondents assume. It contains no reference to methods of competition with independent lines, or of attempts of the combined lines to obtain a monopoly of the trade. The agreements and understandings charged in the amended complaint cannot on any theory fall within the purpose of "Conference Agreement No. 16," expressly stated in paragraph 2, as follows:

> "2. The purpose of said Conference is to agree on reasonable minimum freight rates of said Lines from North Atlantic ports of United States and Canada to the several United Kingdom ports and in all such ways as may be proper to endeavor to stabilize and otherwise improve the steamship import and export trade."

"Conference Agreement No. 16" clearly goes no further than to permit the respondents to co-operate among themselves for lawful purposes. There is nothing in the agreement which is capable of a construction that the conference lines, or those members of the conference who are respondents in this case, intended to enforce practices which have been condemned at common law, under the anti-trust acts and under the Shipping Act itself, as are the practices complained of in this case. Acts which violate the anti-trust laws are not excused because they are induced by good motives. *Thomsen* v. *Cayser*, 1917, 243 U. S. 66, 86.

It is idle for the respondents to argue that the Shipping Board's approval of "Conference Agreement No. 16" carried with it either approval of all agreements which the conference members had made or might thereafter enter into among themselves, or blanket absolution for all acts which they might commit. The mere statement of this argument is its own refutation. It might equally be argued that the approval of a corporation's charter, or the granting of a franchise to do business, gives immunity for all illegal acts committed by the corporation. If any examples were needed they are found in *Menacho* v. *Ward*, 1886, 27 Fed. 529; *U. S.* v. *Pacific & Arctic Co.*, 1913, 228 U. S. 87; and in *Eden Mining Co.* v. *Bluefields Fruit & Steamship Co.*, 1922, 1 U. S. S. B. 41, in which the legality of the organization of the defendants was no defense to condemnation under the common law, Sherman Act or Shipping Act, respectively.

The petitioner has not attacked and does not attack the so-called "Conference Agreement," nor does it make any complaint whatsoever against the respondents based upon their membership in any conference.

The theory advanced by the respondents at page 19 of their brief, to the effect that the agreements and understandings of which the petitioner complains are merely "minor matters," not sufficiently "important" to be filed with or approved by the Shipping Board, is not only disingenuous but is contrary to the express provisions of Section 15 of the Shipping Act (*U. S. Code*, Ti. 46, §814), which provides:

> "That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of *every agreement*

> with another such carrier or other person subject to this Act, * * * fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; * * * The term 'agreement' in this section includes understandings, conferences, and other arrangements." (Italics ours.)

Surely agreements to commit acts, in furtherance of an attempt to monopolize the trade, which have been consistently condemned by the courts and by the Shipping Board itself, cannot be considered mere "minor matters" so as to form the basis for supplying an exception which is contrary to the plain language of the Shipping Act. The respondents may not set up their own judgment as to the necessity for filing agreements among themselves in opposition to the mandatory provisions of the statute.

III

"Shipping Board Ex Parte 5 Contract Rate Investigation" is also immaterial.

The respondents' contention that by virtue of this investigation the Shipping Board "assumed jurisdiction" of the matter sought to be presented in court by the amended bill of complaint is not supported by the facts concerning the Shipping Board proceeding referred to. The fact is that the proceeding in question, the record of which the respondents seek to bring before this Court; (a) was not in any way concerned or thought to be concerned with the Sherman Act; (b) deals entirely with general conditions with reference to the

agreements and understandings complained of in the present case; (c) failed because of an initial procedural defect; (d) was made informal upon the objection and at the request of numerous carriers, among which were included some or all of the respondents in the present case, whose counsel (likewise counsel for the respondents herein) expressly requested that testimony given at the hearing should be protected from use in any subsequent legal proceedings; and (e) resulted in no action whatever by the Board either approving or disapproving any agreement or device.

In the proceedings which the respondents seek to inject into the record in this Court, the matter under discussion related to the factual reasonableness of a differential between contract and non-contract rates when founded upon the cost of service, regularity and number of shipments, quantity of cargo offered, or other considerations of a purely traffic nature, and had nothing to do with joint agreements and understandings to impose exclusive patronage contracts upon shippers in order to obtain a monopoly of the trade. There is a plain distinction between the character of the practices discussed at the Shipping Board's investigation and those complained of in the case at bar. See *United States* v. *Pacific & Arctic Co.*, 1913, 228 U. S. 87; *United States* v. *Great Lakes Towing Co.*, 1913, 208 Fed. 733; *Menacho* v. *Ward*, 1886, 27 Fed. 529; *Eden Mining Co.* v. *Bluefields Fruit & Steamship Co.*, 1922, 1 U. S. S. B. 41.

As has already been discussed at pages 34-46 of the brief for petitioner, reasonableness of the rates or of the differential between them is entirely incidental in this case, because the allegations of the amended bill sufficiently charge unjust discrimination, even though

both contract and open rates are assumed to lie within the "zone of reasonableness" as pointed out by this Court in *American Express Co.* v. *Caldwell*, 1917, 244 U. S. 617, 624, and *United States* v. *Pacific & Arctic Co.*, 1913, 228 U. S. 87, 105.

New York, January 8, 1932.

Respectfully submitted,

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